

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

RONALD DAVIDSON, MARY DAVIDSON,
GREGORY DAVIDSON, and BILL BROWN,

Plaintiffs,

vs.

CIV NO. 05-0005 BB/ACT

TRAVELERS INSURANCE COMPANY,
JOHN AND BARBARA BUNGAY, RIGHT WAY
ROOFING, INC., SABENA ROSE, INC., RUTH WEAVER,
and NORFOLK & WHEI, LLC,

Defendants.

**ORDER RECOMMENDING THAT DEFENDANTS' MOTION
TO DISMISS FOR DISCOVERY VIOLATIONS BE DENIED**

THIS MATTER comes before the Court on Defendants' John and Barbara Bungay, Right Way Roofing, Inc., Travelers Indemnity Company of Connecticut, and Norfolk & Whei, LLC, Motion to Dismiss for repeated and ongoing discovery violations. Defendants John and Barbara Bungay and Right Way Roofing, Inc., originally brought the Motion. [Doc. No. 165]. Defendants Travelers Indemnity Company of Connecticut and Norfolk and Whei, LLC, joined in the Motion with separate pleadings. [Doc. Nos. 172 and 178]. Plaintiffs responded and briefing is complete.

The Magistrate Judge, who is the referral Judge and has been involved since the beginning of this case in the ongoing, extensive and contentious discovery disputes in this case, has reviewed the pleadings with interest. The discovery problems in this case have been substantial and while not going into exhausting detail, seem to be primarily the result of Plaintiffs' dilatory practices.

This Court has now issued more than half a dozen orders in an attempt to resolve the parties' discovery disputes and has awarded attorneys' fees to various Defendants several times as sanctions against Plaintiffs.

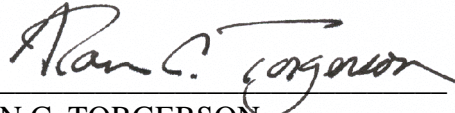
Since a dismissal of this lawsuit with prejudice would be a dispositive order, such an order must emanate from the presiding District Court Judge. However, since the referral Magistrate Judge has been involved in the vast majority of the discovery disputes in this case to date and has been thoroughly versed in the background of this motion, the Magistrate Judge has been asked to review this Motion and make a recommendation to the District Court Judge.

The Court recommends to the presiding District Court Judge that these joint Motions to Dismiss for Discovery Violations be DENIED. A dismissal of a lawsuit for discovery violations is the harshest sanction reserved for the most egregious discovery violations. Ehrenhaus v. Reynolds, 965 F. 2d 916 (10th Cir. 1992). In this case, the award of attorneys' fees in favor of the various Defendants over several occasions appears to have caught Plaintiffs' attention and solved the majority of the previous discovery problems. Other discovery problems involving the timely identification and use of experts and pending motions to exclude certain evidence will be addressed in due time for trial preparation. When lesser sanctions have been shown to be effective, i.e., the award of attorneys' fees as sanctions, the Court need not resort to the harshest sanction of all, dismissal with prejudice. Id.

Therefore, this Court RECOMMENDS TO THE DISTRICT COURT JUDGE THAT THE DEFENDANTS' MOTION TO DISMISS FOR DISCOVERY VIOLATIONS BE DENIED.

NOTIFICATION

THE PARTIES ARE NOTIFIED THAT WITHIN 10 DAYS OF SERVICE of a copy of this Proposed Recommendation, they may file written objections with the Clerk of the United States District Court, Pete V. Domenici United States Courthouse, 333 Lomas Blvd. NW, Albuquerque, NM 87102, pursuant to 28 U.S.C. §636 (b)(1). A party must file any objections within the ten (10) day period allowed if that party wants to have appellate review of the proposed findings and recommendations. If no objections are filed, no appellate review will be allowed.

A handwritten signature in black ink, reading "Alan C. Torgerson", is positioned above a horizontal line.

ALAN C. TORGERSON
UNITED STATES MAGISTRATE JUDGE